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IN THE
Supreme Court of the United States

October Term, 1947.

No. 592.

COMMONWEALTH OF KENTUCKY, - - - *Petitioner,*

v.

ILLINOIS CENTRAL RAILROAD COMPANY, - *Respondent.*

*On Petition for a Writ of Certiorari to the
Kentucky Court of Appeals.*

BRIEF FOR THE RESPONDENT IN OPPOSITION.

FOREWORD.

Copies of the petition for a writ of certiorari in this case were served on respondent, Illinois Central Railroad Company, on January 6, 1948. Petitioner, however, has never served upon respondent a copy of the printed record as required by Rule 38 of this Court. Nevertheless, respondent, at the suggestion of the clerk of this Court and in order to avoid further unnecessary delay in terminating this litigation, is filing this response.

OPINION BELOW.

The opinion of the Court of Appeals of Kentucky which is called in question by petitioner is that of Illinois Central Railroad Company v. Commonwealth of Kentucky, 305 Ky. 632, 204 S. W. 2d 973.

JURISDICTION.

The jurisdiction of this Court is invoked by petitioner under the provisions of Section 237 of the Judicial Code (28 U. S. C. 344), as well as Rule 38 of the Rules of the Supreme Court.

As we shall presently show, this Court does not have jurisdiction of this case under the provisions referred to, or at all, under the facts disclosed by this record.

STATUTE INVOLVED.

The provisions of Section 118.340 of the Kentucky Revised Statutes are as follows:

"Any person entitled to a vote at any election in this state shall, if he has made application for such leave prior to the day of election, be entitled to absent himself from any services or employment in which he is then engaged or employed for a period of four hours on the day of the election, between the time of opening and closing the polls. Such person shall not, because of so absenting himself, be liable to any penalty, nor shall any deduction be made on account of such absence from his usual salary or wages. The employer may

specify the hours during which the employe may absent himself. No person shall refuse an employe the privilege hereby conferred, or discharge or threaten to discharge an employe or subject an employe to a penalty or deduction of wages because of the exercise of the privilege."

STATEMENT OF CASE.

The statement of facts contained in petitioner's brief is substantially correct in so far as it goes. We, therefore, need only summarize the facts.

The Illinois Central refused to pay its employes in Kentucky for the time taken off by them to vote on election day, November 7, 1944. Consequently, some 176 indictments were returned against it in the Circuit Court for McCracken County, Kentucky, for the alleged violation of KRS 118.340 in its failure to pay its employes for time taken off by them to vote.

A typical case was selected for trial, viz., that of W. K. Wall. Under his contract of employment, Wall received \$1.04 per hour for the hours he actually worked. He put in a claim against the Illinois Central for \$2.08 for time alleged to have been taken off to vote by him on November 7, 1944. This claim was denied.

In the trial Court, as well as in the Court of Appeals of Kentucky, the Illinois Central asserted by way of defense, among other things, that KRS 118.340 was void, being in violation of Sections 1, 2, 6, 13, 19 and 26 of the Kentucky Constitution, and of Article 1, Section 10 and the Due Process and Equal Pro-

tection Clauses of the Fourteenth Amendment of the Federal Constitution.

The defendant was convicted in the McCracken Circuit Court in May, 1945, of violating the provisions of KRS 118.340. An appeal was taken to the Court of Appeals of Kentucky and the judgment of the lower Court was reversed on the ground that the indictment was defective (see I. C. R. R. Co. v. Commonwealth, 300 Ky. 817, 190 S. W. 2d 555).

Upon the return of the case to the McCracken Circuit Court, a second indictment was returned, and the defendant was again convicted and a fine imposed. A second appeal was taken to the Court of Appeals of Kentucky, which again reversed the case, holding that KRS 118.340 violated Section 2 of the Constitution of Kentucky, and also the Fourteenth Amendment to the Federal Constitution (see I. C. R. R. Co. v. Commonwealth of Ky., 305 Ky. 632, 204 S. W. 2d 973).

THE QUESTION PRESENTED.

The question raised and considered in the Court of Appeals of Kentucky was the validity of KRS 118.340. The principal, if not the only question, which is raised by the Petition for a Writ of Certiorari is as to the jurisdiction of the Supreme Court. To answer this question we must determine whether or not a Federal question was presented and decided by the Court of Appeals of Kentucky, and if so, whether the decision of the Federal question was necessary to the decision. If the decision of the Court of Appeals of Kentucky

was also rested upon another ground, which is adequate by itself and which involved no Federal question, this Court will not take jurisdiction.

We do not reach the question of validity of KRS 118.340 which was decided by the lower Court until the jurisdictional question has been disposed of.

SUMMARY OF ARGUMENT.

(1) The decision of the Court of Appeals of Kentucky was rested upon two grounds, one of which was Federal, the other non-Federal in character. The non-Federal ground was independent of the Federal ground and entirely adequate to support the decision. This Court is, therefore, without jurisdiction.

(2) The question which the petitioner is undertaking to submit to this Court is moot. The Court of Appeals of Kentucky has issued its mandate to the Circuit Court which, pursuant thereto, has dismissed the case. Both courts have lost the power to take any further steps in the case.

ARGUMENT.

In the language of Mr. Justice Frankfurter, "this Court will not review a State court decision resting on an adequate and independent non-Federal ground even though the State court may have also summoned to its support an erroneous view of federal law. 'Where the judgment of the state court rests on two grounds, one involving a federal question and the other not . . .

and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction.' " (*Radio Station WOW v. Johnson*, 326 U. S. 120, 129).

An examination of the opinion of the Court of Appeals of Kentucky indicates conclusively that the decision of that Court was rested upon two grounds, one of which was Federal and the other non-Federal, and that the non-Federal ground was independent of the Federal ground and amply sufficient to support the decision.

After reviewing the facts and making some general observations, the opinion proceeds:

"Ky. Constitution, Sec. 2, contains these words:

'Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.'

If we interpret the above constitutional provision correctly, it inhibits the legislative power of this state from arbitrarily passing a law taking property away from one person and giving it to another person without value received or without any contractual basis. And this inhibition still stands, regardless of the merit or glory or value or need of the person on the receiving end of the transaction. Hardly a more worthy objective could be designed than that of building a great hospital for crippled children of all creeds and colors, a marvelous, public enterprise, and yet the constitution would not sanction a law saddling the burden of such an undertaking upon the farmers of Kentucky to the exclusion of its butchers, bak-

ers and candlestick makers. Such a law would constitute an exercise of arbitrary power over the property of that group of freemen known as farmers. Its arbitrariness would lie in its unfairness and in its preferment. The law will not countenance a public maintenance of a private enterprise. Neither should the law demand a private maintenance of a public enterprise. Voting is a public enterprise. But if its maintenance is required by the employer group rather than by the entire, broad, general public, then that amounts to a requirement of private maintenance of a public enterprise."

(305 Ky. 632, 634; 204 S. W. 2d 973, 975.)

There can be no doubt that by the foregoing language the Kentucky Court held that KRS 118.340 violated Section 2 of the Kentucky Constitution and was therefore void.

Section 2 of the Kentucky Constitution is a part of the Kentucky Bill of Rights. Section 26 of the Kentucky Constitution provides:

"To guard against transgression of the high powers which we have delegated, We Declare that everything in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void."

The Kentucky Court of Appeals is the final authority as to the effect of the provisions of the Kentucky Constitution. Since it has held that KRS 118.340 violates that Constitution, the statutory provision is void

and without effect and there is nothing left for this Court to decide with respect to it.

The opinion proceeds:

"We also believe that the wage-payment-for-voting-time provisions of this statute are antagonistic to the United States Constitution, particularly that provision which says that no state shall deprive any person of his property without due process of law or deny to any person in its jurisdiction the equal protection of the law."

(305 Ky. 632, 635; 204 S. W. 2d 973, 975.)

The opening words of the foregoing quotation, viz., "We *also* believe," indicate clearly that the decision of the Court with respect to the Federal question was entirely separate and distinct from its decision with respect to the non-Federal question, viz., the validity of KRS 118.340 under the provisions of the State Constitution. The finding that the State statute violates the provisions of the State Constitution, and is therefore void, is an adequate ground (and it is a non-Federal ground) to support the decision of the Kentucky Court.

In *New York City, et al., v. Central Savings Bank, et al.*, 306 U. S. 661, the memorandum opinion states:

"Petition for writ of certiorari to the Supreme Court of New York denied for the reason that the judgment sought to be reviewed rests upon a non-federal ground adequate to support it."

The opinions of the New York Court (278 N. Y. 266, 280 N. Y. 9, 18 N. E. 2d 151, 19 N. E. 2d 659)

show that the question involved was the constitutionality of Chapter 713 of the laws of the State of New York of 1929, known as the Multiple Dwelling Law. Its constitutionality was questioned both under the State and Federal Constitutions. The New York court held that it violated Article I, Section 6 of the Constitution of the State of New York in that it constituted a taking of property without due process of law, and also that it violated the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States for the same reason. The finding of invalidity under the State Constitution was held a sufficient non-Federal ground to sustain the judgment, and certiorari was denied. The situation in the present case is identical. This Court should deny the present petition because "the judgment sought to be reviewed rests upon a non-Federal ground adequate to support it."

The principles upon which we are relying are so well-settled that we feel further discussion would be an imposition on this Court. See:

New York City, et al., v. Central Savings Bank, et al., 306 U. S. 661,
Klinger v. State of Missouri, 13 Wall. 257,
Fox Film Corporation v. Muller, 296 U. S. 207,
Richardson Machinery Co. v. Scott, 276 U. S. 128,
Enterprise Irrigation District, et al., v. Farmers Mutual Canal Co., et al., 243 U. S. 157.

THE CASE IS MOOT.

The Civil Code of Practice of Kentucky provides (§760):

"The Court of Appeals may make rules for the convenient dispatch of business, the preservation of order, the argument of cases or motions, and the manner and time of presenting motions or petitions for rehearing, therein; and the time for issuing its mandates and decisions, and the mode of enforcing its mandates and orders, and may change the same: *Provided*, That no mandate shall issue, nor decision become final, until after thirty days, excluding Sundays, from the day on which the decision is rendered, unless the court, in delay cases, otherwise direct; and, if said thirty days expire during a vacation or recess of the court, a written order of one of its judges, filed in its clerk's office, within said thirty days, shall have the same effect to suspend the mandate, by allowing a petition for a rehearing to be filed, or by allowing time to file such petition, as if such order were made by the court."

Pursuant to the authority contained in the above provision, the Court of Appeals of Kentucky had adopted certain rules. Rule 1.050 has to do with "Terms of Court," and is as follows:

"Three terms of Court will be held each year, to be known as the winter, spring and fall terms, beginning respectively on the first Monday in January, the second Monday in April and the third Monday in September. When the first Monday in January falls on the first day of January, the term

will begin on the next day. There will be a two weeks' vacation at the close of the winter and fall terms, respectively. The spring term will close on the Friday following the third Monday in June."

Rule 1.520 has to do with "Rehearings," and is as follows:

"Whenever a motion is made for an extension of time within which to file a petition for rehearing, whether by agreement or otherwise, the motion shall state the reasons for requesting such extension, and the motion will only be granted if the reasons shall be good and sufficient. When the time to file such petition is extended and the time expires during vacation, or where the court adjourns before the time for filing a petition for rehearing has expired, the filing of the petition in the Clerk's office within the time shall be held sufficient. Petitions for rehearing may also be filed with notice in the Clerk's office on any day of the term to have the same effect as if filed in Court on that day. The Clerk, however, has no right to extend the time for filing and this can only be done by an order from one of the judges, filed in the Clerk's office before the mandate issues."

The opinion of the Court of Appeals which the petitioner seeks to have this Court review was delivered on June 3, 1947. The Commonwealth, through its Attorney General, obtained an extension of time within which to file Petition for Rehearing to August 1, 1947. The Petition for Rehearing was overruled on November 14, 1947. On the same day the Court of Appeals of Kentucky issued its mandate to the Circuit Court

directing that judgment of the latter court be set aside.*

The Court of Appeals of Kentucky adjourned on December 19, 1947. Its Fall Term ended on that day. On January 5, 1948, under the rules of that Court, the Winter Term began. During the Fall Term the Court of Appeals had authority to recall the mandate which it had issued during that term. When that term ended it lost all power to take any further steps in the case.

The principle that a Court loses jurisdiction of a case upon the termination of the term at which it has entered a final order is well settled. It has been recognized for many years by the Kentucky Court of Appeals:

Bradford v. Patterson, 1 A. K. Marsh. (8 Ky.)
464.

Beazley v. Mershon, 6 W. P. D. Bush (69 Ky.)
424.

The principle has been recognized by the Federal Courts also:

Hazel-Atlas Glass Co. v. Hartford-Empire Co.,
322 U. S. 238, 244.

Bronson v. Schulten, 104 U. S. 410, 415.

Standard Asphalt Co. v. American Surety Co.,
5 Fed. Supp. 430.

*The mandate issued by the Court of Appeals on November 14, 1947, was filed in the McCracken Circuit Court on December 8, 1947, and on that date the Circuit Court entered an order terminating the case. Although these facts may not appear in the record which has not been served upon us, they are facts of which we feel this Court should be apprized.

No attempt was made by the Commonwealth prior to the end of the Fall Term of the Court of Appeals of Kentucky to stay the proceedings in that Court, as permitted by U. S. C., Title 28, Section 356.

The Commonwealth here seeks from this Court a Writ of Certiorari to the Court of Appeals of Kentucky. Neither that Court nor the Circuit Court in which this case arose has power to enter any order or to take any further steps in this case either at the direction of the United States Supreme Court or of any other tribunal. The action of this Court either in granting the petition or in considering the case on the merits would, therefore, be utterly futile.

CONCLUSION.

For the reasons hereinabove set out, it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

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